WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

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HONOR ROLL

515th Session, Basic Law Enforcement Academy, Seattle – King County Regional Police Academy
September 1st, 1999 through January 28th, 2000

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Best Overall:	Matthew Hyra – Seattle Police Department
Best Academic:	Carol Rodriguez – Seattle Police Department
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504th Session, Basic Law Enforcement Academy - October 20th, 1999 through January 10th, 2000

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MARCH LED TABLE OF CONTENTS

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UNITED STATES SUPREME COURT

CITIZEN'S UNPROVOKED HEADLONG FLIGHT UPON SEEING POLICE CARS IN AREA KNOWN FOR HEAVY NARCOTICS TRAFFICKING JUSTIFIED TERRY SEIZURE

Illinois v. Wardlow, 120 S.Ct 673 (2000)

Facts and Proceedings: (Excerpted from majority opinion)

> On September 9, 1995, officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago police department. The officers were driving the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.
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> As the caravan passed 4035 West Van Buren, officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. [Wardlow] looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street. Nolan then exited his car and stopped [Wardlow]. He immediately conducted a protective pat-down search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, officer Nolan squeezed the bag [Wardlow] was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered a .38-caliber handgun with five live rounds of ammunition. The officers arrested Wardlow.

> The Illinois trial court denied [Wardlow's] motion to suppress, finding the gun was recovered during a lawful stop and frisk. Following a stipulated bench trial, Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois appellate court reversed Wardlow's conviction, concluding that the gun should have been suppressed because officer Nolan did not have reasonable suspicion sufficient to justify an investigative stop pursuant to Terry v. Ohio, 392 U.S. 1 (1968).
>
> The Illinois Supreme Court agreed. While rejecting the appellate court's conclusion that Wardlow was not in a high crime area, the Illinois Supreme Court determined that sudden flight in such an area does not create a reasonable suspicion justifying a Terry stop. The court explained that although police have the right to approach individuals and ask questions, the individual has no obligation to respond. The person may decline to answer and simply go on his or her way, and the refusal to respond, alone, does not provide a legitimate basis for an investigative stop. The court then determined that flight may simply be an exercise of this right to "go on one's way," and, thus, could not constitute reasonable suspicion justifying a Terry stop.
>
> The Illinois Supreme Court also rejected the argument that flight combined with the fact that it occurred in a high crime area supported a finding of reasonable suspicion because the "high crime area" factor was not sufficient standing alone to justify a Terry stop. Finding no independently suspicious circumstances to support an investigatory detention, the court held that the stop and subsequent arrest violated the fourth amendment.

ISSUE AND RULING: Did the officers have reasonable suspicion justifying a Terry stop of Wardlow based on his headlong unprovoked flight upon seeing their patrol car in an area known for heavy narcotics trafficking? (ANSWER: Yes, rules a 5-4 majority, there was reasonable suspicion under “totality of the circumstances” analysis).

Result: Reversal of Illinois appellate court decisions suppressing evidence; case remanded to Illinois courts for further proceedings (presumably, reinstatement of firearm conviction).

ANALYSIS: (Excerpted from majority opinion)

> This case, involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in Terry. In Terry, we held that an officer may, consistent with the fourth amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the fourth amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity.
>
> Nolan and Harvey were among eight officers in a four car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to

warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a Terry analysis.

In this case, moreover, it was not merely [Wardlow's] presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight--wherever it occurs--is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Such a holding is entirely consistent with our decision in Florida v. Royer, 460 U.S. 491 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

[It is argued] that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the fourth amendment. Even in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. Terry recognized that the officers could detain the individuals to resolve the ambiguity.

In allowing such detentions, Terry accepts the risk that officers may stop innocent people. Indeed, the fourth amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The Terry stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found [Wardlow] in possession of a handgun, and arrested him for violation of an Illinois firearms statute. No question of the propriety of the arrest itself is before us.

The judgment of the Supreme Court of Illinois is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

LED EDITORIAL COMMENT: Of course, any time the U.S. Supreme Court makes a Fourth Amendment search-and-seizure ruling, Washington officers have to ask: Does article I, section 7 of the Washington Constitution impose a greater restriction? The Washington

Supreme Court issued a number of "independent grounds" search-and-seizure rulings in the early to mid-1980's. Then the Court went into a period of semi-dormancy from the mid-1980's to the mid-1990's, issuing only a few such rulings. But in the past two years, the Washington Supreme Court has issued six significant "independent grounds" search-and-seizure rulings addressing the following issues: the definition of seizure-of-the-person (Young); impound-inventory scope (White); knock-and-talk consent (Ferrier); control of non-violator passengers at traffic stops (Mendez); pretext stop restrictions (Ladson); and permissibility of motor-vehicle-search-incident-to-arrest-of-nonarrestees' effects (Parker, Jines, Hunnel).

The question following the U.S. Supreme Court's decision in Wardlow is whether the Washington Supreme Court will create a narrower definition of "reasonable suspicion" for Washington officers. Our best guess is that the Washington Court will not issue an "independent grounds" ruling on this issue, but that the Court will interpret Wardlow in a restrictive way.

A number of past Washington decisions have indicated (in analysis variously addressing the Fourth Amendment alone or addressing both the Washington and U.S. constitutions) that a person's unprovoked flight at the sight of police is significant, but not sufficient alone, in determining whether an officer has reasonable suspicion justifying a Terry seizure. Compare the discussion in the majority opinion by (former) Justice Dore in State v. Little, 116 Wn.2d 488 (1991) June 91 LED:09, with the dissenting opinion in the same case by (former) Justice Utter and (current) Justice Smith. The makeup of the Washington Supreme Court has changed significantly in recent years, and, as mentioned at the outset of this Comment, the current trend is in the civil libertarian direction.

Nonetheless, we think that a majority of the Washington Court will go along with Wardlow, though, as we indicated above, giving it a restrictive reading. Such a restrictive reading would focus on the facts of Wardlow. There, the officers were in an area known for heavy drug trafficking activity when a suspect looked at them and immediately ran off in headlong flight. What if the officers there instead had merely said that the area was a "high crime area"? What if the officers had not noticed whether the suspect had identified them as police officers before he took off? What if the suspect had not gone into headlong flight, but instead had merely turned away and walked off quickly, or had merely turned and put an unidentified object in his pocket or made some other ambiguous furtive gesture? These are all qualifying facts which the Washington courts might rely upon to rule that the "totality of the circumstances" test of Wardlow has not been met.

In summary, Wardlow probably defines "reasonable suspicion" under the Washington constitution, but only time will tell. Washington officers, as always, must carefully articulate all suspicious facts in their reports as they, their agencies, prosecutors, and the Washington courts try to assess what constitutes "reasonable suspicion" under a "totality of the circumstances" test. Does the officer have information as to criminal activity which has been occurring recently in the area, and what is the source of that information? What is the nature of the area otherwise, what was the time of day, and why are those things relevant? For example -- was the suspect who was engaging in suspicious behavior in a warehouse area of town late at night when no businesses were open? Did the officer have prior knowledge of the suspect's past criminal activity? Have informants or citizens reported suspicious behavior by the suspect? What was the exact behavior of the suspect and others (e.g. apparent lookouts) observed by the officer just prior to the stop? What is the officer's experience and training that makes suspicions reasonable (no "profiling" phraseology or ethnic/racial stereotyping)?

Note further that if Washington officers give a clear signal to stop, a "seizure" has occurred at the point where the signal is given under the "independent grounds" reading of the Washington constitution in State v. Young, 135 Wn.2d 498 (1998) Aug. 98 LED:02. On the other hand, if officers merely follow the suspect without giving a signal or command to stop, then no "seizure" has occurred under Young. And if, in the course of merely following the suspect who is apparently trying to evade the officers, he or she tosses something away, the officer may seize the abandoned item and likely will then have reasonable suspicion for a Terry stop under Young. Furthermore, once officers with reasonable suspicion to make a Terry stop give a signal or command to stop, if the suspect continues to try to evade them, the officers likely will be deemed to have probable cause to arrest for "obstructing" under RCW 9A.76.020, thus justifying an arrest for that crime. See State v. Hudson, 56 Wn. App. 490 (Div. I, 1990) April 90 LED:16.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

ONLY "FIREWORKS" AS DEFINED BY FIREWORKS LAWS COME WITHIN THE EXEMPTION TO EXPLOSIVES ACT; OFFICER'S "INNOCENT MISTAKE" IN FAILING TO NOTE SUSPECT'S UNLICENSED STATUS IN AFFIDAVIT DOES NOT RENDER SEARCH WARRANT INVALID -- In In re Personal Restraints of Yim and Samphao, State v. Yokley, 139 Wn.2d 581 (1999), the Washington Supreme Court holds that the appropriate reading of the "fireworks" exemption in the Washington State Explosives Act is that it is narrow and includes only "fireworks" as defined by the Fireworks Laws. The Court also holds that a search warrant for a defendant's home was valid despite the supporting affidavit's failure to note that defendant did not have an explosives license.

Yim, Samphao Case

Yim and Samphao were found with over 40,000 "M-80s" and nearly 200 tennis balls filled with "flash powder," as well as materials for manufacturing them. They each pleaded guilty to several violations of the Explosives Act. They later moved to withdraw their guilty pleas, alleging that the materials they possessed were "fireworks" and thus, exempt from the Explosives Act, which provides that it "'shall not apply to: . . . The importation, sale, possession, and use of fireworks.'"

In rejecting this argument, the Court states:

> [W]e begin by noting that, as the Court of Appeals held in Yokley, [91 Wn. App. 773 (Div. I, 1998) **Feb 99 LED:19**], the most reasonable reading of the Explosives Act and the Fireworks Law is that the only explosive items and activities that are exempt from the Explosives Act, under the "fireworks" exemption, are those items and activities which are regulated under the Fireworks Law.

The Court determines that in order to fall within the exemption the petitioners "must establish that the explosive items that they manufactured and sold were 'fireworks,' as defined by the Fireworks Law, and thus exempt from the Explosives Act." The Court holds that the petitioners [defendants] failed to do so.

Yokley Case

The Yokleys were charged with four counts of violating the Explosives Act. Two counts were based on Mr. Yokley's sale of explosive devices to an undercover officer, and two counts were based on the seizure of "M-250s" and "tennis ball bombs" from their home. Like defendants Yim and Samphao, the Yokleys argued that the materials were "fireworks."

The Yokleys also argued that the search warrant for their home was invalid because the affidavit did not support a finding of probable cause because it did not allege that Mr. Yokley did not have a license to sell or possess fireworks or explosives. Considering the affidavit, the Yokley Court notes that while the affidavit did not expressly state this, it did, however, state:

> (1) [T]here was evidence of "Illegal Possession of Explosive Devices" and of an "Illegal Explosive[s] Factory" at the specified locations within the affidavit; (2) an

> undercover King County police officer telephoned Donald Yokley and placed "an order for [a] large amount of improvised illegal explosive devices . . . for a cost of $7,000.00 which included delivery cost"; (3) after the undercover police officer ordered the explosive devices from Donald Yokley, Yokley was observed taking a plastic bag and white box from his apartment and placing them in a car that was registered to him and his wife, Penny, and then driving to his wife's place of employment, where he took several white boxes from the car he was driving and loaded them into another car, which was also registered to him and Penny, and then driving off in the latter car; (4) Donald Yokley then proceeded to deliver these same boxes to an undercover officer at the Northgate Mall and the officer handed Yokley $7,000 in cash, after which the police arrested him; (5) police officers opened one of the boxes that Yokley delivered on scene and it was found to contain what appeared to be explosive devices; (6) during the delivery the undercover police officer said to Yokley, "I guess you want something from me," to which Yokley responded, "I want to get out of here quick"; and (7) after Donald Yokley's arrest police officers searched his person and found paperwork relating to the manufacture of illegal explosives.

[Citations to the record omitted.]

In concluding that the affidavit was sufficient under the common sense reading required in this legal context, the Yokley Court explains:

> This information, all of which was set forth in the sworn affidavit of a King County police detective, provides support for the magistrate's decision that there was probable cause to believe contraband existed at the Yokleys' home. More specifically, we are satisfied that the magistrate could reasonably infer from the information in the affidavit that Donald Yokley was probably engaged in the unlicensed manufacture and sale of explosive devices. The inference that Donald Yokley was unlicensed logically follows because "[i]n performing his independent, detached function, the magistrate is to operate in a commonsense and realistic fashion. He is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth." . . . "[S]upport for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." In short, we are satisfied that an "ordinary person" reading the affidavit in this case would reasonably conclude that Donald Yokley was engaged in the unregulated sale and/or manufacture of explosive devices "at the time of application" for the search warrant.
>
> [B]oth this court and the United States Supreme Court have held that "'[a]llegations of negligence or innocent mistake [in the drafting of a supporting affidavit] are insufficient'" to void a warrant. The affiant's failure to specifically state that Donald Yokley did not possess an explosives license, when one can easily draw this inference from the affidavit, clearly falls within the category of "negligence" or "innocent mistake."
>
> In sum, we believe that an ordinary person viewing the affidavit in a commonsense manner would reasonably infer that Donald Yokley probably did not possess a license to sell explosive devices. . . .

[Citations and footnote omitted.]

Result: Affirmance of Court of Appeals decision denying the personal restraint petitions of Andrew Yim and Deng Samphao, and reinstating the prosecutions of Donald Maynard Yokley and Penny Gay Yokley in King County Superior Court.

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WASHINGTON STATE COURT OF APPEALS

AFFIDAVIT DESCRIBING "CITIZEN" INFORMANT'S OBSERVATION OF MARIJUANA GROW SURVIVES CHALLENGE RE; "RELIABILITY" PRONG OF PROBABLE CAUSE TEST

State v. Bauer, ___ Wn. App. ___, 991 P.2d 668 (Div. II, 2000)

Facts: (Excerpted from Court of Appeals opinion)

> A citizen informant contacted the Washington State "marijuana hotline" and Pierce County Sheriff's Deputy Kim Pecheos to report a marijuana grow operation at Jeffery Allen Bauer's residence at 10324 Kapowsin Highway in Graham. The informant expressed concern about the manufacture and sale of illegal narcotics, needed the State reward money, and wished to remain anonymous for fear of retaliation. Deputy Pecheos confirmed that the informant had been a citizen of Washington for over nine years, was a registered voter, and had no criminal history. Pecheos also confirmed details of the informant's factual information and obtained power records for that address, depicting an unusually high increase in power consumption during June and July: higher than for the colder months of January through April, over twice as high as a comparison residence's usage, and nearly three times the amount used by the previous tenant.
>
> Based on this information, Pecheos compiled an affidavit in support of a search warrant, reciting, in part, the following:
>
> The C/c stated that Jeffery A. Bauer and Dawn Swab live at the residence located at 10324 Kapowsin Hwy E. and have the marijuana grow inside the residence. The C/c stated that he/she had been living in a residence for over five years where a marijuana grow was being operated about 12 years ago and is familiar with what growing marijuana looks like, smells like and knows the various stages of growth of the marijuana plant. The C/c also admitted to using marijuana in the past. The C/c has observed the marijuana grow within the last thirty days while visiting Jeffery Bauer and Dawn Swab. There are about 96 maturing marijuana plants in what used to be the spare bedroom. The room has since been walled off and the only entrance is through a secret door behind some paneling in the living room. The window to the bedroom has been covered with a foam core insulation that has reflective material on one side. Mother plants and starter plants are in a separate room. The C/c described the residence as being a two bedroom house with a detached garage. The yard is well maintained and the house is surrounded by fields. The C/c stated that Jeffery Bauer drives a white Chevy Camaro with a license number of "GIGAWAT", has a red ford pickup, a jet boat, and Dawn Swab drives a blue square shaped car. The C/c also stated that Bauer owns a business called "JIGAWATTS".
>
> **[Court's Footnote:** ***Deputy Pecheos confirmed the following information: that there was a two-bedroom residence at 10324 Kapowsin Highway East with a detached garage and a well-maintained yard, surrounded by fields; that it appeared that one window on the east side of the residence was covered from the inside; that Bauer owned a 1984 Chevy Camaro and a jet boat; that Dawn Swab owned a 1986 blue Nissan Pulsar, which was square in shape, that Bauer owned a business called "JIGAWATTS"; and that Bauer's driver's license listed 10324 Kapowsin Highway East as his address.***]

On August 29, 1996, the Pierce County Superior Court issued a search warrant for Bauer's property, based on Pecheos' affidavit.

The warrant was executed the next day, resulting in the seizure of growing marijuana from Bauer's residence.

Proceedings: Bauer was charged with unlawfully manufacturing a controlled substance under RCW 69.50.401(1). The trial court denied his motion to suppress the evidence seized under the search warrant, and he was convicted.

ISSUE AND RULING: Did the search warrant affidavit's description of the "citizen" informant satisfy the credibility prong of the two-pronged Aguilar-Spinelli test for informant-based probable cause? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Pierce County Superior Court conviction of Jeffery Allen Bauer for unlawful manufacture of marijuana.

ANALYSIS: (Excerpted from majority opinion)

Washington applies the two-pronged Aguilar-Spinelli test to determine whether information provided by an informant establishes probable cause to issue a search warrant: basis of knowledge and reliability. State v. Jackson, 102 Wn.2d 432 (1984). Both prongs of the Aguilar-Spinelli test must be satisfied to establish probable cause. If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test.

[W]e conclude that Pecheos' affidavit establishes probable cause for the issuance of a search warrant because it demonstrates both the factual basis for the informant's knowledge and reliability of the citizen informant. Thus, it is not necessary for us to address the alternate prong, whether the officer independently corroborated the information.

A. Basis of Informant's Knowledge

The knowledge prong of the Aguilar-Spinelli test is satisfied if the informant has personal knowledge of the asserted facts. Here, 12 years earlier, the informant had lived for five years in another residence where marijuana was grown and had become familiar with the appearance and smell of marijuana; also, the informant had used marijuana in the past. Within the previous 30 days the informant had visited Bauer and had seen the marijuana grow in a walled-off room, accessible only through a secret door; the mother plants were in a room separate from the starter plants.

Based on past experience, the informant could recognize marijuana growing. The description of Bauer's grow, particularly the location of the secret room, demonstrates the informant's knowledge of Bauer's criminal activity. We hold that the knowledge prong of the Aguilar-Spinelli test is satisfied.

B. Reliability (Credibility) of Citizen Informant

The level of evidence necessary to establish the reliability prong of Aguilar-Spinelli depends on whether the informant is a professional or a citizen informant. **[Court's Footnote:** ***Bauer contends that the informant is a professional because he or she is not acting solely from a sense of civic duty but is motivated by self-interest in the financial reward. But Bauer cites no authority for the proposition that interest in a public hotline financial reward transforms a citizen informant into a professional***

***informant-for-hire*.]** Evidence of past reliability is not strictly required where the informant is a citizen.

To establish the reliability of a citizen informant, the police must "interview the informant and ascertain such background facts as would support a reasonable inference that he is `prudent' or credible, and without motive to falsify." To guard against the "anonymous troublemaker," Washington requires "heightened demonstrations of credibility for citizen informants whose identities were known to the police but not revealed to the magistrate." The affiant must supply enough additional information to support an inference that the informant is telling the truth.

[Court's Footnote: ***Bauer relies on State v. Ibarra, 61 Wn. App. 700 (1991) [Nov 91 LED:06], State v. Mickle, 53 Wn. App. 39 (1988) [March 89 LED:08], and State v. Franklin, 49 Wn. App. 106 (1987), to support his contention that the information in Deputy Pecheos' affidavit was insufficient to establish the informant's credibility. These cases, however, are distinguishable. In Ibarra and Mickle, the affidavits do not identify why the informants were at the crime scene or what were the informants' reasons for remaining anonymous. In Franklin, the officer offered only "his personal opinion that the informant was an upstanding citizen since the informant had no criminal record, was motivated by a desire to thwart crime, and requested anonymity because of fear of retribution." The only supporting fact provided to the magistrate was that the informant had no criminal record, which Division Three held was not enough information to allow the magistrate to determine credibility.***

Moreover, as the State argues, Bauer's case is similar to State v. Berlin, 46 Wn. App. 587 (1987), in which the affidavit stated:

> ***Affiant has checked and found that the concerned citizens involved had no criminal background, came forward voluntarily, gave the appearance of being an honest citizen, and gave to affiant his or her name, phone number, and address to affiant [sic] but wishes to remain anonymous for fear of retaliation.***

***The court found that, because the informants had divulged their names and addresses to the affiant, and because the affiant had checked their backgrounds, had determined that they had no criminal records, and gave a legitimate reason why they wished to remain anonymous, there was enough information for the magistrate to determine reliability.*]**

The record here confirms that the informant was a concerned citizen. The informant revealed his or her identity to Deputy Pecheos, who confirmed that the informant did not have a criminal record, had been a citizen of Washington for over nine years, and was a registered voter. The informant had observed the marijuana grow while recently visiting Bauer's home. The informant recited fear of retaliation as a valid reason for remaining anonymous and concern about the manufacture and sale of illegal narcotics as one reason (in addition to the hotline reward) for reporting the crime. As presented to the issuing magistrate, Pecheos ascertained sufficient background facts to support a reasonable inference that the informant was credible and without motive to falsify. We hold that the warrant meets the second prong of the Aguilar-Spinelli test.

[Some citations and footnotes omitted]

Judge Armstrong's Dissent: In dissent, Judge Armstrong criticizes the majority's conclusion on the affidavit's showing of credibility of the "citizen" informant. Judge Armstrong points out that the affidavit tended to show that the informant was himself or herself involved in the drug world, and asserting that the affidavit failed to report: 1) receiving the informant's phone number and address; and 2) the reason why the informant was visiting the defendant.

LED EDITORIAL COMMENT: The Bauer decision by Division Two goes into a mixed bag of arguably inconsistent Court of Appeals decisions on what it takes to establish that a person is a presumptively credible "citizen" information source. The Washington Supreme Court has not yet issued an opinion on this sub-issue. With minor modifications, we re-state our suggestion in the November 91 LED in relation to State v. Ibarra, 61 Wn. App. 695 (Div. II, 1991) Nov 91:06:

> **There is no hard-and-fast rule for establishing "citizen" status of an information source. In dealing with citizen informants, an affiant wishing to establish their credibility will most likely want to consider the following checklist and to include as many of the items as the facts of the investigation will support:**
>
> **1) that the informant had identified him/herself to the affiant,**
> **2) that the police had checked and found no criminal record and had no basis for believing the citizen-informant was involved in any criminal activity,**
> **3) that the citizen-informant had given his/her address and telephone number to the affiant,**
> **4) that the citizen-informant was personally known to the affiant and or had a reputation for trustworthiness in the community,**
> **5) that the citizen-informant was a public-spirited citizen whose interest in this matter was in assisting law enforcement and who had no apparent motive to make a false report,**
> **6) that that citizen-informant had requested confidentiality because he/she feared physical, social, and/or emotional retribution if his/her identity was revealed,**
> **7) that it has been the affiant's experience and training that revealing the identities of citizen-informants discourages other citizens from providing information to law enforcement officers, and**
> **8) that the citizen-informant did not request monetary compensation for disclosure of the information.**

"FAILURE TO RETURN FROM FURLOUGH," NOT "ESCAPE," WAS PROPER CHARGE

State v. Dorn, 93 Wn. App. 538 (Div. II, 1999)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On October 1, 1996, Dorn was sentenced to 180 days in the county jail for the crime of theft in the second degree. On November 21, 1996, he was granted a medical furlough to attend an eye examination the next day. Dorn did not return from his furlough, and was later apprehended in Oregon.
>
> Dorn was charged with escape in the first degree, RCW 9A.76.110 and convicted at a bench trial on stipulated facts. Dorn contends that he should have been charged with the specific crime of failure to return from a furlough, RCW 72.66.060, rather than under the general escape statute.

ISSUE AND RULING: Was the only appropriate charge for Dorn's conduct under RCW 72.66.060 – "failure to return from furlough?" (ANSWER: Yes) Result: Reversal of Grays Harbor County Superior Court conviction of Brian J. Dorn for escape in the first degree; case remanded for possible prosecution under RCW 72.66.060.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> "'[W]here a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.'" State v. Danforth, 97 Wn.2d 255 (1982).
>
> Thus, the question is whether Dorn could have been prosecuted under both statutes. The parties agree that Dorn fit the criteria under the first degree escape statute. But the State contends that Dorn could not have been prosecuted under the furlough statute because RCW 72.66.010(2) defines a furlough as "an authorized leave of absence for an eligible resident...." And "resident" is defined "as person convicted of a felony and serving a sentence for a term of confinement in a state correctional institution or facility...." RCW 72.66.010(4). The State then turns to the work release statute, which defines "state correctional institutions" as "all state adult correctional facilities established pursuant to law under the jurisdiction of the department for the treatment of convicted felons sentenced to a term of confinement." RCW 72.65.010(3). Therefore, concludes the State, Dorn could not be prosecuted under the furlough statute because he was not a resident of a state correctional institution under the jurisdiction of the Department of Corrections. We disagree.
>
> In State v. Basford, 56 Wn. App. 268 (1989), the court held that all convicted felons, even those sentenced to county jails, are under the authority of the Department of Corrections. The court relied upon RCW 70.48.400, which provides that "[p]ersons sentenced to felony terms or a combination of terms of more than three hundred sixty-five days of incarceration shall be committed to state institutions under the authority of the [D]epartment of [C]orrections." Noting the disjunctive, and that Basford had been convicted of a felony, Division Three held that Basford was under the authority of the Department of Corrections even while serving his sentence in a county jail, and that he was therefore a "prisoner" who could be charged under the applicable statute.
>
> Basford in turn relied upon State v. Newman, 40 Wn. App. 353 (1985) and Danforth. Newman held that county jails are part of the "penal or correctional system of the state," that a county jail was a "prison," and that "a county jail falls within the chain of penal institutions of the state." Newman noted that Danforth, which held that a prisoner covered by both the escape and failure-to-return-from-furlough statutes must be charged under the latter, expressly overruled a case in which an inmate had been held at a "county-city" facility. Basford was recently followed in State v. Smeltzer, 86 Wn. App. 818 (1997) **March 98 LED :21**.
>
> We agree with the reasoning of Basford. Because Dorn was subject to prosecution under RCW 72.66.060, the specific statute, the State was required to do so.

[Some citations and footnotes omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DEFENDANTS IN CASES IN TWO DIVISIONS OF THE COURT OF APPEALS LOSE ARGUMENTS THAT THEIR FIREARMS RIGHTS WERE AUTOMATICALLY RESTORED UPON THEIR RELEASE FROM PAROLE – In Forster v. Pierce County, ___ Wn. App. ___, 991 P.2d 687 (Div. II, 2000) and State v. Radan, ___ Wn. App. ___, 990 P.2d 962 (Div. III, 1999), different divisions of the Court of Appeals reject claims by defendants that their rights to possess firearms were automatically restored when they were discharged from parole.

FORSTER DECISION BY DIVISION TWO

Carey Forster sued Pierce County in 1997, alleging that the county was unlawfully denying him a concealed pistol license. Forster had been convicted of a felony drug crime in Washington in 1972. In 1977 the Parole Board issued him a "Final Discharge Restoring Civil Rights." In his suit against the City and County, Forster argued that discharge from the Parole Board was equivalent to a Certificate of Rehabilitation under RCW 9.41.040(3). Agreeing with a 1988 Washington Attorney General Opinion,

Division Two rejects Forster's argument. The Forster Court also points out that a 1993 amendment to RCW 9.96.050 made clear that Forster's argument fails.

Forster also argued that RCW 9.41.070(3) supported his claim that his firearms rights had been restored. The Forster Court explains why it rejects this theory:

> Forster also claims to have satisfied RCW 9.41.070(3). It provides: Any person whose firearms rights have been restricted and who has been granted relief from disabilities by the secretary of the treasury under 18 U.S.C. Sec. 925(c) or who is exempt under 18 U.S.C. Sec. 921(a)(20)(A) shall have his or her right to acquire, receive, transfer, ship, transport, carry, and possess firearms in accordance with Washington state law restored except as otherwise prohibited by this chapter.
>
> 18 U.S.C. § 921(a)(20) provides:
>
> > (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include -- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
> >
> > What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.
>
> Forster apparently reasons that RCW 9.41.070(3) incorporates all of 18 U.S.C. 921(a)(20); that 18 U.S.C. 921(a)(20) allows a person whose civil rights have been restored to possess firearms despite a previous conviction; and thus that he has an unrestricted right to possess firearms. This reasoning is clearly wrong. RCW 9.41.070 incorporates 18 U.S.C. 921(a)(20)(A), not 18 U.S.C. 921(a)(20). 18 U.S.C. 921(a)(20)(A) refers only to "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." Forster did not commit an antitrust violation, unfair trade practice or similar offense related to the regulation of business practices, so he has not satisfied RCW 9.41.070(3).

Finally, the Forster Court rejects Forster's claim that it violated his rights under ex post facto constitutional protections to apply changes made in the law after his 1972 conviction making possession of a firearm a crime. Agreeing with a decision of Division One of the Court of Appeals in State v. Watkins, 76 Wn. App. 726 (Div. I, 1995), **April 95 LED:02**, the Forster Court concludes that there is no ex post facto problem, because Forster will not be punished for past conduct, but only for future conduct (i.e., possessing a firearm in the future).

Accordingly, Division Two affirms the dismissal by Pierce County Superior Court of Forster's case.

RADAN DECISION BY DIVISION THREE

In 1997, Richard Allen Radan was prosecuted in Pend Oreille County for unlawful possession of a firearm under RCW 9.41.040. He had been convicted previously in Montana of felony theft. Montana law had automatically restored his firearms rights prior to the events in Pend Oreille County which triggered his prosecution there in 1997.

As did Division Two in the Forster case summarized above, Division Three rejects the argument that the automatic restoration of his firearms rights under Montana law should be viewed as the equivalent of a certificate of rehabilitation under RCW 9.41.040(3). The Radan Court also rejects defendant's argument that the "full faith and credit" clause of the Federal Constitution requires that Washington honor Montana's restoration of rights procedure. In addition, Division Three also rejects Radan's argument that a federal law deferring to state restoration of rights procedures applies in Washington.

Accordingly, Division Two reverses a Pend Oreille County Superior Court order dismissing a charge against Radan under RCW 9.41.040(3).

LED EDITORIAL COMMENT: In Radan, Division Three appears to have overlooked RCW 9.41.070(3), which was discussed by Division Two in Forster. And we question Division Two's extremely narrow view of how much of federal law was incorporated into state law under RCW 9.41.070(3). In our view, the Forster Court reached the right result (because RCW 9.41.070(3) has no effect on Washington convictions), but the Radan Court may have gotten it wrong (because Montana's automatic restoration of Radan's rights for a "non-serious" offense may have automatically restored his rights under RCW 9.41.070(3).) In a 1996 letter stating co-editor Wasberg's informal views, he stated his personal view on the question of the effect of RCW 9.41.070(3) on out-of-state convictions. He would be happy to share a copy with any reader who wants to see the letter.

(2) FIRST AMENDMENT BARS WARRANTLESS ARREST OF SELF-TOUCHING, LEWD NUDE DANCERS – In Furfaro v. City of Seattle, 97 Wn. App. 537 (Div. I, 1999), Division One of the Court of Appeals rules in a civil rights lawsuit that, before making arrests for violations of the City of Seattle's standards-of-conduct ordinance prohibiting nude dancers from sexual self-touching during stage performances, officers must obtain arrest warrants.

The manager and two dancers from Rick's, a nude dancing business in Seattle, sued the City of Seattle and several Seattle police officers. The lawsuit sought damages and injunctive relief against Seattle officers who had made physical arrests when the officers had observed what they believed to be violations of the Seattle "standards-of-conduct" ordinance. The Court of Appeals agrees with the plaintiffs that their civil rights were violated by the police, even if the officers were correct in their assessments of probable cause. Warrantless arrests of entertainers, including nude dancers, operate as "prior restraint", or unconstitutional censorship, in violation of the free speech protections of the First Amendment, the Furfaro Court holds.

Result: Reversal of King County Superior Court order dismissing plaintiffs' civil rights suit against the City of Seattle; affirmance of dismissal of actions against individual officers (the dismissals of the actions against individual officers were based on qualified immunity, an issue not addressed in this **LED** entry) .

(3) 9-YEAR-OLD CHILD MOLESTATION VICTIM WHO SAID SHE WOULD REFUSE TO TESTIFY HELD "UNAVAILABLE" THOUGH TRIAL COURT HAD NOT ORDERED HER TO TESTIFY – In State v. Hirschfield, ___ Wn. App. ___, 987 P.2d 99 (Div. I, 1999), the Court of Appeals holds that a 9-year-old child molesting victim was "unavailable" to testify within the meaning of RCW 9A.44.120(2)(b) and, therefore, that her hearsay statements were properly admitted through testimony of her mother and a child interview specialist for the prosecutor's office.

After an incident at a swimming pool in which Richard Joseph Hirschfield allegedly molested a 9-year-old and a 10-year-old, the child victims were questioned by numerous people. Prior to Hirschfield's trial for child molesting, the 9-year-old decided that she would not tell her story anymore. She refused to testify. The trial court held a pre-trial hearing, in which the trial judge explored the 9-year-old's reluctance to testify. She told the judge that her prior accounts were truthful, but that she would refuse to testify even if the judge ordered her to testify. Without testing her resolve by ordering her to testify, the judge ruled she was "unavailable" to testify. Therefore, the judge permitted hearsay testimony regarding the 9-year-old's prior out-of-court statements.

After Hirschfield was convicted, he appealed. He argued, among other things, that the 9-year-old had not been properly determined to be "unavailable" for purposes of the child abuse hearsay rule of RCW 9A.44.120(2)(b). That statute relaxes the rules for admission of testimony regarding child sex abuse victims hearsay statements under certain circumstances. However the hearsay testimony is admissible under subsection (2) only if:

> 2) The child either:
> a) Testifies at the proceedings; or
> b) *Is unavailable as a witness:* PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Under Evidence Rule 804(a), "unavailability" is defined as including a declarant who:

> Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so…

The Hirschfield Court rules that the "availability" of the 9-year-old was sufficiently tested by the trial judge:

> The trial judge expressly asked her whether she would change her mind and testify if he expressly ordered her to do so. She replied she would not. We see no purpose whatsoever, under these circumstances, in holding that the trial court was required to order her to testify when it was clear to that court that she would not. That would have been a useless act. The trial court applied appropriate judicial pressure by its questioning, and nothing further was required.

Result: Affirmance of King County Superior Court convictions of Richard Joseph Hirschfield for rape of a child in the first degree and child molestation in the first degree (one count each).

(4) CORPUS DELICTI RULE DOES NOT APPLY IN INVOLUNTARY COMMITMENT HEARINGS OR IN OTHER CIVIL PROCEEDINGS -- In State v. M.R.C., 98 Wn. App. 52 (Div. II, 1999), the Court of Appeals holds that the corpus delicti rule does not apply in non-criminal proceedings. Therefore, in an involuntary commitment proceeding under chapter 71.05 RCW, the State could use Mortimer Castle's uncorroborated admission to Officer Gerald Swayze that Castle had engaged in sexual conduct with an 11-year-old.

The corpus delicti rule, as applied in criminal cases, requires that the evidence establish the elements of the particular crime charged independent of a defendant's confession to the crime. The confession is admissible on such cases only if the elements of the crime are independently established. This rule presents a particular problem in child sexual abuse cases where the child victim does not testify at the criminal trial, and no other witness and no physical evidence is available.

The M.R.C. Court notes that Washington courts have not previously addressed the issue of whether the corpus delicti rule applies in civil proceedings. But courts in other jurisdictions have held that the rule does not apply in civil matters. The M.R.C. Court chooses to follow the holdings of those cases from other jurisdictions.

Result: Affirmance of Pierce County Superior Court order committing Mortimer R. Castle to Western State Hospital for 180 days of involuntary psychological treatment.

(5) RUNNING OVER A DEAD BODY AND LEAVING THE SCENE IS NOT FELONY HIT-AND-RUN -- In State v. Wagner, 97 Wn. App. 344 (Div. II, 1999), the Court of Appeals rules that a driver does not commit felony hit-and-run under RCW 46.52.020(1) in running over an already-dead body and leaving the scene without fulfilling the requirements of the hit-and-run statute.

As he drove on a dark winter night, defendant Wagner was unaware that another driver had just struck and killed a bicyclist. Wagner drove over the dead body and continued on his way without stopping. He was subsequently charged with violating RCW 46.52.020(1), which provides in part that "[a] driver of any vehicle involved in an accident resulting in the injury to or death of any person shall immediately stop . . . and in every event remain at, the scene of such accident until he has fulfilled the requirements of subsection (3) of this section . . ." The State alleged that the dead body was a "person" within the meaning of the statute, and that Wagner's striking of the body therefore was an accident resulting in injury to a "person" (i.e., the dead body).

Rejecting the State's argument that a dead body is a "person," the Wagner Court states:

> [W]e think that the legislature intended the word "person" to have the same meaning for injury as for death; that it obviously did not intend the word "person" to include a dead body in connection with death; and that it likewise did not intend the word "person" to include a dead body in connection with injury.

The Wagner Court also points to the rule of lenity, which requires that ambiguous criminal statues be construed in favor of the accused. This statute is ambiguous, the Court concludes, at least with respect to the possible criminality of a driver running over a dead body. The Court concludes that: "RCW 46.52.020(1) makes a driver guilty of a Class C felony if he or she fails to remain at the scene of an accident that results in injury to, or the death of, a living person." (Emphasis added.)

In a final footnote, the Wagner Court points out that its opinion does not consider whether the dead body in the roadway might be "other property" under the gross misdemeanor provisions of the hit-and-run statute. That issue was not before the Court.

Result: Reversal of Clallam County Superior Court felony hit-and-run conviction of Charzette Jane Wagner.

(6) VOLUNTARY INTOXICATION DEFENSE TO SECOND DEGREE TRESPASS AND THIRD DEGREE ASSAULT REJECTED; ALSO, TRESPASS EVIDENCE SUFFICIENT -- In State v. Finley, 97 Wn. App. 129 (Div. III, 1999), the Court of Appeals determines that, although there was ample evidence the defendant had been drinking, nothing in the evidence connected his intoxication with an inability to form the mental states necessary to commit the crimes of second degree criminal trespass and third degree assault. Accordingly, the trial court did not err in refusing an instruction on the legal effect of voluntary intoxication.

The Finley Court also holds that there was sufficient evidence to support Finley's conviction for second degree trespassing. Finley returned to the a bar shortly after being 86'd by the bartender. The bartender called police. When officers arrived, Finley was outside. The officers and bartender each warned Finley not to go back in the bar. Shortly after the officers left, Finley went back in the bar. At that point, the officers returned and arrested Finley. This was sufficient evidence to support a trespassing conviction, the Finley Court holds.

Result: Affirmance of Kittitas County Superior Court convictions of David Arnold Finley for third degree assault and second degree criminal trespass.

(7) "BARRATRY" CHARGE COULD NOT BE PURSUED AGAINST PRO SE DEFENDANT WHO FILED PLEADING PAPERS ON ARRESTING OFFICERS ON TRAFFIC CHARGE – In State v. Duffey, 97 Wn. App. 33 (Div. II, 1999), the Court of Appeals rules that a pro se defendant who served interrogatories on the arresting officers in a traffic case could not lawfully be prosecuted for barratry. The Court of Appeals describes the facts of the case as follows:

> The State arrested Duffey for driving with a suspended operator's license and for having no license tabs on his vehicle. After his arrest, Duffey served upon the two arresting officers a document entitled "Demand for Particulars With respect to `C178614 & 320194'." The Demand resembles a pleading and contains the following warning on the second page: "THIS IS LEGAL PROCESS, YOU ARE COMPELLED TO RESPOND."
>
> A list of 75 questions resembling a set of interrogatories starts on the sixth page, followed by the admonition:
>
> > Failure by you to timely respond to the Demand for the Bill of particulars within ten (10) day's [sic] or as a seasonably requested extension will establish, will be construed as an attempt by the officers of the court to withhold full disclosure as to the nature and cause of the action(s) purportedly brought in the above Case, and will make it impossible for the Demandant to meaningfully respond to the process issued or caused to be issued by the officers of the Court and will be used as Prima Facie evidence of Fraud, Bad Faith and Criminal Intent to deprive Demandant of his right of redress, due process, and civil rights as defined in Title 42 Section(s) 1983, 1984, 1986. U.S.C.A.
>
> Duffey signed the document as the "Demandant." The Demand does not carry the signature of a judicial officer.

The "barratry" statute at RCW 9.12.010 provides as follows:

> Every person who brings on his or her own behalf, or instigates, incites, or encourages another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit, or who serves or sends any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process, is guilty of a misdemeanor; and in case the person offending is an attorney, he or she may, in addition thereto be disbarred from practicing law within this state.

The Duffey Court, after extensive analysis, concludes that Duffey's filing of papers did not constitute barratry:

> Thus, we conclude that the Demand was essentially a constitutionally protected request for a bill of particulars drafted in a technically deficient manner. We do not believe that the Legislature intended to make litigants who serve or file improperly drafted pleadings or motions criminally liable for barratry notwithstanding the substantive validity of the litigants' documents.
>
> Rather, we conclude that the Legislature intended a narrow interpretation of "judicial process" that would discourage the use of patently false documents purporting to be or resembling judicial authority for the purposes of intimidation or fraud.
>
> No reasonable trier of fact could find that Duffey's Demand, a verbose and clumsy attempt to obtain a bill of particulars, falls within this narrow definition.

[Citations and footnote omitted]

Result: Affirmance of Kitsap County Superior Court dismissal of barratry charges against Timothy Charles Duffey.

Status: The Washington Supreme Court has accepted review.

(8) CRIME OF POSSESSION OF STOLEN ACCESS DEVICES DOES NOT REQUIRE PROOF STOLEN CREDIT CARDS STILL OPERATIONAL AT TIME OF ARREST – In State v. Schloredt, 97 Wn. App. 789 (Div. I, 1999), the Court of Appeals holds that a stolen credit card qualifies as an "access device" under the crime of possessing stolen property whether or not the State can prove the credit card is still operational when the defendant is found in possession of the stolen credit card.

The police found defendant Schloredt in possession of nine credit cards in names of Adam Dick and Cecilia Asencio, who were victims of separate car prowl thefts several days earlier. In Schloredt's prosecution for possessing stolen property, the prosecutor did not put on evidence to establish that the credit cards were operational at the time that Schloredt was found in possession of them.

Schloredt appealed from his conviction, arguing that the State was required to prove the credit cards were still operational when he was caught with them. Schloredt pointed to the definition of "access device" at RCW 9A.56.010(3), which refers to a "card, plate, code, account number or other means of account access that can be used…to obtain money, goods, services or anything else of value, or that can be used to initiate a transfer of funds…" The phrase "can be used" is in the present tense, Schloredt argued, and therefore the credit card must be proved to be still operational when found in the defendant's possession.

The Schloredt Court rejects this argument, calling it "absurd" to assume the Legislature did not intend to criminalize possession of a stolen credit card solely because a theft victim discovered the theft and cancelled the account on the stolen card before defendant was apprehended. Instead, the Court finds the phrase, "can be used," refers to the status of the access device when last in possession of its lawful owner. The evidence was sufficient to establish that the stolen credit cards were operational when stolen from the cars of Dick and Asencio; therefore, Schloredt's appeal is reject by the Court.

Result: Affirmance of King County Superior Court conviction of Phillip Lynch Schloredt for possessing stolen property in the second degree (four counts) and burglary in the second degree (one count) (the facts relating to the burglary conviction are not addressed in this **LED** entry).

(9) POSTDATED CHECK SUPPORTS FORGERY CONVICTION -- In State v. Young, 97 Wn. App. 235 (Div. I, 1999), the Court of Appeals holds that, because a postdated check creates a legal liability, it can support a conviction for forgery. The Court also holds that the trial court did not err in counting the defendant's convictions separately, because the separate check-cashing incidents do not constitute the same criminal conduct.

The defendant was charged with five counts of forgery for presenting five photocopied checks to the same check-cashing outlet on different days within a nine day period. Four of the checks were drawn on the same business account. The fifth was drawn on a different account and was also postdated. No check was written on an account for which Young had authority to write checks.

Relying on the Uniform Commercial Code (UCC) section that provides that a promise or order to pay may be payable at a fixed date, the defendant argued that the postdated check could not have created a legal

liability because the time for payment had not yet arrived. (Forgery requires an instrument which, if genuine, may have legal effect or be the foundation of legal liability.)

The Court concludes otherwise. The Court points out that the UCC does not state that a postdated check is not negotiable. The Court then notes that the UCC states that an instrument "may be antedated or postdated," and that unless a customer notifies a bank of a postdated check under specific procedures, the bank can pay the check before the date on the check and charge the customer's account. The Court concludes that a postdated check can create a legal liability

The defendant also argued that the trial court erred in counting the first four counts of forgery (as well as previous convictions) separately for purposes of sentencing. The defendant made several arguments, all of which are rejected by the Court. The Young Court finds that the crimes were committed on separate days, were not part of a single transaction or criminal episode, and did not involve the same criminal intent.

Result: Affirmance of Snohomish County Superior Court convictions and sentence on five counts of forgery against Darryl William Young.

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LAW ENFORCEMENT MEDAL OF HONOR—NOMINATIONS ARE OPEN

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 19, 2000 at the Capitol Rotunda in Olympia, commencing at 1:00 PM. This is the last day of Law Enforcement Week across the nation.

The Law Enforcement Medal of Honor Committee is accepting nominations for those officers who will be honored in this year's ceremony. Nominations must be postmarked no later than March 15, 2000. If you wish to submit a nomination, and wish to obtain a copy of the Rules and Qualifications and blank Nomination Forms, please call 206-389-2554 or write to Gary Fox, Secretary, Law Enforcement Medal of Honor Committee, P.O. Box 40116, Olympia, WA 98504-0116. You may also obtain a copy of the rules and forms from your local Chief or Sheriff, as a complete set of these documents have also been sent to them. You may also contact the committee at the above phone number and address if you want assistance in the preparation of your nomination, or if you have any questions or concerns.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

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NEXT MONTH

The April 2000 **LED** will include, among other recent appellate court decisions, entries on: 1) State v. Baity, ___ Wn.2d ___ (2000) 2000 WL 123812 (holding DRE evidence admissible, so long as proper protocols are followed, to prove DUI where driving is alleged to be impaired by one of seven drugs other than alcohol); 2) State v. Barker, 98 Wn. App. 439 (Div. II, 2000) (holding that an Oregon State Police (OSP) officer with a Washington State Patrol commission was not authorized to make an arrest in Washington State, because the OSP Officer did not have a certificate of training from the Washington Criminal Justice Training Commission, but that suppression of evidence was not an appropriate sanction for failure to satisfy RCW 10.93.090);

and 3) State v. Porter, ___ Wn. App. ___, 990 P.2d 460 (Div. III, 2000) (holding that court-authorized electronic surveillance under RCW 9.73.090 and 130 in the case did not meet the statutory requirement for showing that other normal investigative methods were unworkable, and, due to that noncompliance, no evidence gathered in the surveillance process could be admitted against a Yakima attorney, Frederick Porter, who bartered his legal services for methamphetamine).

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains a web site with Washington appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court: [http:www.courts.wa.gov/]

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington Legislation and other state government information can be accessed at [http://access.wa.gov/] clicking on "L" and then "legislation" or other topical entries in the "Access Washington Home Page "Index."

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 439-3740, ext. 272; Fax (206) 439-3752; email [EJohnson@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available on the Commission's Internet Home Page at:[http://www.wa.gov/cjt].